at fault.[8] To these agreements, as a further inducement to the wronged party to resume marital relations, there is often added a provision that the wronged party shall receive certain property if the party who has been at fault in the past shall give new cause for divorce in the future. In *Bowden v. Bowden,* the California Supreme Court makes a sound distinction between cases in which the wronged party agrees to accept such property in substitution for the rights which the law would give, and cases in which such property is to be accepted in addition to ordinary legal rights. In the first case, by substituting for the rights which the law gives rights chosen by the parties, future misbehavior is encouraged, public policy is thwarted, and the agreement is invalid.[9] In the second case, by adding to the rights which the law gives, future misbehavior is discouraged, public policy is promoted, and the contract is valid.[10]

P. L. F.

PRINCIPAL AND SURETY: SURETY COMPANY'S CONTRACT, WHETHER ONE OF GUARANTY OR OF INSURANCE: METHOD OF INTERPRETING CIVIL CODE.—Ought not the courts to recognize a distinction in respect to the manner of interpretation between the Civil Code and statutes?[1] As long ago as 1884, Professor Pomeroy contended that "the only mode by which . . . . the benefits of codification may be partially realized from it [the Civil Code] is . . . . by adopting and strictly enforcing this uniform principle of interpretation—that all its provisions are to be regarded as simply declarations of the previous common law and equitable doctrines and rules, except where the intent to depart from those doctrines and rules clearly appears from the unequivocal language of the text."[2] It would seem that either from a logical or from a historical consideration of the matter, Professor Pomeroy's theory should prevail. The codifiers did not intend to make over the entire legal system of the state; their purpose was merely to re-state the principles of the common law, save in those cases where changes were manifestly intended. The Supreme Court of California has frequently acted upon this liberal theory of interpretation. For example, in a recent case, commented upon in the March number of this Review, the

---

[8] McKay v. McKay (1916), 189 S. W. 520.

[9] Pereira v. Pereira (1909), 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107.

[10] (Aug. 13, 1917), 54 Cal. Dec. 134, 167 Pac. 154.

[1] Ernst Freund, Interpretation of Statutes (a chapter of a forthcoming treatise on the Elements of Law), 65 University of Pennsylvania Law Review, 229.

[2] 4 West Coast Reporter, p. 152. It is doubtful whether the expression "previous" common law is not too narrow.

court applied the common law doctrine of alluvion to lands situated on the seashore in interpreting section 1014 of the Civil Code, notwithstanding that the section refers only to rivers and streams and that it is borrowed word for word from the French Civil Code which confines the application of the doctrine to rivers and streams.[3] In another notable instance, the court overruled a prior decision which followed narrowly the language of section 2911 of the Civil Code, declaring a lien extinguished by the lapse of time within which an action might be brought upon the principal obligation.[4] A careful examination of the court's opinions might easily multiply such instances.

It must be conceded that in other cases the court has followed a less elastic theory in construing the Civil Code. In his admirable article on "The Law Merchant and California Decisions," Professor Kidd has called attention to the court's failure to recognize that law was made for business and not business for law, in its decision that corporate bonds were non-negotiable because they referred to a mortgage.[5] This signal failure to interpret the code according to its spirit rather than its letter was immediately remedied by legislation.[6]

It is to be regretted that in another branch of commercial law, the rapidly developing law affecting surety companies, the Supreme Court, in *The First Congregational Church of Christ v. Lowry v. Pacific Surety Company,*[7] felt itself bound to hold that, though the modern common law almost everywhere classes the contract of a surety company with contracts of insurance rather than of guaranty, in California such companies are governed by the strict law of guaranty. Yet the learned Justice who delivered the opinion said thirteen years ago, speaking of the construction of statutes and constitutions, "the instrument was not fixed, set and hardened upon the day of its adoption, but is, and was meant to be, flexible enough to meet the changing conditions of our civilization."[8]

All the countries of Europe and South America have been forced to adopt principles of liberal interpretation in construing their codes.[9] Otherwise, the codes would become, like the iron

---

[3] Strand Improvement Company v. City of Long Beach (1916), 161 Pac. 975, 52 Cal. Dec. 616, with comment in 5 California Law Review, 261.

[4] Puckhaber v. Henry (1907), 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, overruling Mutual Life Ins. Co. v. Pacific Fruit Co. (1904), 142 Cal. 477, 76 Pac. 67.

[5] 2 California Law Review, 377.

[6] Cal. Stats. 1915, p. 99.

[7] (May 12, 1917), 53 Cal. Dec. 602, 165 Pac. 440.

[8] San Francisco etc. Ry. Co. v. Scott (1904), 142 Cal. 222, 237, 75 Pac. 575.

[9] Layton B. Register, Judicial Interpretation of Foreign Codes, 65 University of Pennsylvania Law Review, 39.

bands with which certain savage races in Australia are wont to bind their childrens' heads, instruments to arrest legal development, rather than to simplify it. "We do not inquire," says M. Ballot Beaupré, former President of the Court of Cassation, in speaking of the method of the French courts in reading their Civil Code,—"We do not inquire what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be."[10] Without going quite so far as the learned French jurist, is there any good reason why our courts in interpreting the California Civil Code should not do so in the light of the common law, viewing the common law itself not solely as the "previous" common law, but as a constantly developing body of principles which meets the actually existing conditions of life?

O. K. M.

PROCESS: SERVING FOREIGN CORPORATION BY SERVING STATE OFFICER.—The California statute[1] providing that process on a foreign corporation may be served on the Secretary of State if the corporation fails to designate an agent for service, is unconstitutional, according to the decision of the Federal Court for the Southern District of California in the case of *Knapp v. Bullock Tractor Company.*[2] The court, recognizing that the Secretary of State is not required to inform the corporation of the service[3] and that it would probably be ignorant of the litigation, holds that the statute fails to guarantee reasonable notice and is therefore a denial of due process of law. Although this decision harmonizes with several cases in which similar statutes in other states have been held invalid,[4] it is admittedly in conflict

---

[10] Quoted by Munroe Smith, Jurisprudence, p. 30.

[1] Cal. Civ. Code, § 405, repealed by Cal. Stats. 1917, p. 381 and re-enacted as par. 3, sec. 2 of Foreign Corporations Act, Cal. Stats. 1917, p. 371. The same principle would obviously apply to the similar provision with regard to foreign partnerships, found in Cal. Civ. Code, § 2472. A different principle might apply, however, to the provision of the Corporate Securities Act, Cal. Stats. 1917, p. 673, requiring foreign corporations desiring to issue securities to appoint the Secretary of State their agent to receive process. See dictum contra, Knapp v. Bullock Tractor Co. (1917), 242 Fed. 543, at p. 552. Under this provision, it might be held that the Secretary would be bound to notify the corporation, Sparks v. National Masonic Ass'n (1896), 100 Iowa 458, 69 N. W. 678 and service would be sufficient Paulus v. Hart-Parr Co. (1908), 136 Wis. 601, 118 N. W. 248; Mutual Reserve Ass'n v. Tuchfeld (1908), 159 Fed. 833, even if the corporation failed to make such an appointment. Ehrman v. Teutonia Ins. Co. (1880), 1 Fed. 471; note 59 L. Ed. 987.

[2] (May 19, 1917), 242 Fed. 543.

[3] Holiness Church v. Metropolitan Church (1910), 12 Cal. App. 445, 107 Pac. 633.

[4] King Tonopah Mining Co. v. Lynch (1916), 232 Fed. 485; Southern Ry. Co. v. Simon (1910), 184 Fed. 959; Souner v. Missouri Valley Bridge